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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-249

LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
Petitioner,

v.

CITY ELECTRIC, INC., on its own behalf and on behalf of City-Manson-Osberg, a Joint Venture composed of City Electric, Inc., Manson Construction & Engineering Co., and Osberg Construction Co.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner, Local Union 77, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on May 28, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The order of the District Court for the Western District of Washington granting the respondent's motion for

summary judgment, which is unreported, also appears in the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on May 28, 1975, and this petition was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the record presents a material question of fact thus making the District Court's grant of summary judgment and the Court of Appeals' affirmance thereof erroneous.

2. Whether the District Court's partial vacation of an arbitration award rendered pursuant to a valid collective bargaining agreement between the parties, and the Court of Appeals' affirmance thereof, was erroneous.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

§185 (a). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any succh labor organizations, may be brought in any district court of the

United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This action was initiated by City Electric, Inc., on its own behalf and on behalf of City-Manson-Osberg, a Joint Venture composed of City Electric, Inc., Manson Construction & Engineering Co., and Osberg Construction Co. The respondent will be referred to here as the "contractor" or the "employer". The petitioner is Local Union 77, International Brotherhood of Electrical Workers, AFL-CIO and will be referred to here as the "union". A valid collective bargaining agreement governed the wages, hours and working conditions of certain of the contractor's employees at all times material to the instant action.

This case concerns a dispute about payment of a travel allowance to employees employed by the contractor at Grand Coulee Dam. Since 1967, a construction program has been underway at Grand Coulee in connection with expansion of the hydroelectric generating facilities at that location. This program has involved eight or ten different electrical contractors, who have all been members of an employers' association known as the "National Electrical Contractors Association" (NECA). The workmen employed by such contractors have been represented for purposes

of collective bargaining by the union. They have all been covered by the terms of the collective bargaining contract, between the union and the local line constructors' chapter of NECA, which is part of the record in these proceedings. (Exhibit A to Complaint, RA 1-6)

In Article V, such contract provides for payment of travel allowance to the covered employees if they are "working out of" a "REPORTING HEADQUARTERS". No such allowance is provided for men working out of "PERMANENT HEADQUARTERS" (the contractor's established shop) or "JOB HEADQUARTERS".

To qualify as a "JOB HEADQUARTERS" so as to eliminate the necessity for travel allowance, a location must be "a place where accommodations are sufficient within a 5 mile radius . . . to provide suitable board and lodging for all men reporting" thereto. (V, 5.3)

Apart from the contractor here, all of the electrical contractors who have undertaken jobs in connection with the expansion at Grand Coulee have paid their men represented by the union at least $10.00 per day as travel allowance. The $10.00 allowance is less (by some $6.00 per day) than would have been required contractually had Grand Coulee been considered a "REPORTING HEADQUARTERS" and

$10.00 per day more than would have been required had Grand Coulee been considered a "JOB HEADQUARTERS". Such contractors have paid the $10.00 allowance to their men on the basis of *ad hoc* agreements arrived at with the union in the course of "pre-job conferences" called for by Article V of the underlying collective bargaining contract. (Attachment to Affidavit of John F. Lane, RA 34-35, pp. 4-5, union's memo to CIR)

In the foregoing context, the contractor here, also a member of NECA and bound by the collective bargaining contract, was awarded a job in connection with the Grand Coulee expansion program. At a pre-job conference with the union held on April 26, 1972, the contractor refused the union's request that the men employed on the job be paid the $10.00 allowance in keeping with the practice established by agreement with the other contractors. The union and the contractor, were unable to resolve the matter at the pre-job Conference so, on the date thereof, they entered into a "pre-job agreement" as contemplated and authorized by Article V, 5.1 of the collective bargaining contract. In its material part, such pre-job agreement reads as follows:

> The above pre-job Agreement for 30 day period only. Travel pay agreed to through Labor-Management or Arbitration will be paid retroactive to date of hire of all employees referred to the job. (Emphasis supplied) (Affidavit of John F. Lane, attachment, RA 34-35, union's memo to CIR, p. 9)

When the contractor declined to agree to the $10.00 travel allowance for its men at Grand Coulee, the union processed the matter through the contractual disputes procedure in accordance with the pre-job agreement and the provisions of Article V, 5.1 of the underlying collective bargaining contract. (Affidavit of Lane aforesaid)

In accordance with such procedure, on May 17, 1972, the matter was presented first to a regional "Labor-Management Committee", composed of equal numbers from the labor and management, in Portland. The union took the view before such Committee that Grand Coulee did not qualify as a "JOB HEADQUARTERS" because of insufficient living facilities at that location. The contractor took the counter position that it was not required to pay any travel allowance whatsoever because Grand Coulee qualified as a "JOB HEADQUARTERS" under the definition appearing in Article V of the collective bargaining contract.

After hearing from both sides, the Labor-Management Committee was unable to come to a decision about what ought to be done in the case, so "the matter" was referred to arbitration in accordance with those provisions in Article V of the contract reading as follows:

> If the Labor - Management Committee cannot agree, the matter shall be referred to Arbitration under the rules and procedures adopted by the

> parties to the Agreement. (5.1, Emphasis supplied)

Among the "rules and procedures adopted by the Parties" to govern arbitrations conducted under Article V, is the following:

> The decision of the Arbitrator shall be rendered on the merits of the facts in accordance with the working Agreement and shall be final and binding upon both parties. (Section 10, Emphasis supplied.) (Exhibit B attached to Complaint, RA 1-6)

Among the provisions of "the working Agreement" which the Arbitrator was entitled and required to consider in resolving the parties' dispute are the following:

> (1) "The intent of this Agreement is to establish uniform conditions of employment for Outside Electrical Workers . ." (Purpose and Scope of This Agreement, Emphasis supplied.)
>
> (2) "The Electrical Contractor and the Union have a common and sympathetic interest in the Electrical Industry. Therefore, a working system and harmonious relations are necessary to improve the relationship between the Employer, the Union and the Public. Progress in industry demands a mutuality of confidence between the Employer and the Union. All will benefit by continuous peace and by adjusting any differences by rational common sense methods . . ." (Basic Principles, Emphasis supplied.)

The arbitration hearing was held before Reverend W. J. McGettigan, of Portland, on May 19, 1972. Each party took essentially the same position before the arbitrator as had been submitted to the Labor-Management Committee. After the hearing, Reverend McGettigan issued a written decision which, in its essentials, reads as follows:

> It is the opinion of the arbitrator that viewing the particular situation as presented by City Manson Osberg and Union #77, I.B.E.W. regarding the requirements of the Grand Coulee KV Switchyard Project and the findings of the survey made by the arbitrator that Grand Coulee can be accepted as Job Headquarters for this Project to which a total of 22 men shall report.
>
> It is also the opinion of the arbitrator that, in keeping with common practice and past experience (not "past practices" or "established practices") which should have been known by City Manson Osberg at the time of estimating and bidding on this project, the contractor and the union shall seek to negotiate the matter of an additional daily stipend to the workmen employed on this particular project. As the United States Supreme Court pointed out in a 1960 decision, the arbitrator's decision is not limited only to the wording of the contract but must take into consideration "such factors as the effect on productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished" . . . [*Steelworkers vs. Warrior and Gulf*, 363 US at 581-582]

> While the arbitrator cannot accept—as stated in a previous hearing on Grand Coulee—that $10.00 is an established amount to be paid men who are required to report to Grand Coulee as Job Headquarters, it is his opinion that the fact that men in the same industry, working on similar jobs and under the jurisdiction of the same union as those employed by City Manson Osberg for this project, are receiving an additional sum creates a situation that requires the attention of the parties involved and which demands consideration. This matter is referred to City Manson Osberg and Union #77, I.B.E.W. for negotiation." (Emphasis supplied) (Exhibit C, attached to Complaint, RA 1-6)

After the arbitrator's decision was returned, the union and the contractor disagreed as to interpretation and application of its terms.

The union interpreted the decision to mean only that the parties were directed to negotiate a travel allowance and that, in any case, Grand Coulee could not be a "job headquarters" so long as more than 22 men from all crafts were engaged on the employer's job at that location. On the other hand, the employer read the decision to mean that it had no obligation of any description whatsoever with respect to a travel allowance for its men at Grand Coulee so long as less than 22 of its linemen were employed there; the contractor also took the view that direction from the arbitrator relative to negotiation of a "stipend" was unauthorized and void. (Affidavit of Lane aforesaid)

Under the provisions of Article I of the collective bargaining contract*, the union referred the dispute regarding interpretation of the arbitrator's decision to the Labor-Management Committee with the following written statement of its position:

> It is the Union's contention that the contractor has failed on two counts to abide by a decision rendered through the arbitration procedure.
>
> 1. (Re: page 7 — May 19, 1972 — McGettigan) "This matter is referred to City Manson Osberg and Union #77, I.B.E.W. for negotiation." (emphasis added)
>
> 2. Contention by the contractor that "maximum of 22 men employed on the project" (page 6) means only those referred by L.U .#77.

The Labor-Management Committee heard the dispute posed by the foregoing statement on June 5, 1972, but was unable to agree as to its disposition so the union, following the next step in the contractual procedure, referred the matter to the Council on Industrial Relations for the Electrical Construction Industry of the United States and Canada (CIR). (Affidavit of Lane aforesaid)

The contractor brought a lawsuit seeking essentially the same relief as it seeks in this case but voluntarily dismissed that action by agreement with the union whereby the CIR was to determine the matter.

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* Article I is set forth in its entirety in Appendix C.

(RA 61, 64, 73) Both the union and the employer submitted written briefs to the CIR and appeared before it in Washington, D. C. to argue the case orally. On August 16, 1972, the CIR sustained the position of the union by a written decision reading in part as follows:

> 1. That the Arbitrator's decision has not been fully complied with in that the parties have not negotiated to conclusion on the issue of a daily stipend.
>
> It is suggested that the parties continue to negotiate on the issue. Failing agreement the parties shall return this matter to the November 1972 session of the Council on Industrial Relations for final determination (RA 56)

The union and the employer did not reach agreement on the issue of the daily stipend or "travel allowance". In accordance with the CIR decision, the matter was regularly noted for oral presentation before the CIR in Washington, D. C. on November 28, 1972, the parties having therefore submitted extensive written briefs. (Affidavit of John R. Lane, RA 34-35)

As noted hereinabove, by their contract, the parties have empowered the CIR to resolve disputes between them as follows:

> Should this [Labor-Management] Committee fail to agree to adjust <u>any</u> matter, such shall then be referred to the "Council on Industrial Relations for the Electrical Construction Industry of the United States and Canada". Its decisions shall be <u>final</u> and <u>binding</u>. (1.7—Emphasis added)

The CIR, composed of equal numbers from labor and management has a long history and a national reputation as a unique forum for effective resolution of disputes within the collective brgaining community in the electrical construction industry. The CIR has "legislative" as well as "judicial" powers. It determines disagreements arising in the course of contract negotiations, as well as grievance disputes arising during a contract's term. In sum, throughout the electrical construction industry, the CIR is intended to serve and does serve as an effective substitute for strike action. (See attachment to the Second Affidavit of John F. Lane, RA 36)

After the rulings of the CIR, the instant lawsuit was instituted. Subsequently, the contractor was granted summary judgment voiding the ruling of arbitrator McGettigan, which was upheld and reaffirmed by the CIR, that the parties should negotiate and "enforcing" McGettigan's opinion that Grand Coulee could be accepted as job headquarters if no more than 22 men were assigned there. An appeal by the union ensued and this petition followed the Court of Appeals' affirmance of the summary judgment.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court of Appeals Departed from Well Established Principles Governing Motions for Summary Judgment and Conflicts with Decisions Rendered by Courts of Appeals of other Circuits.

The District Court erred in summarily determining the case as a matter of law because the record poses questions of material fact which must be resolved by trial. After the union referred its grievance based on the McGettigan decision and Article V of the Contract to the overall disputes procedure provided for by Article I of the parties' contract, the contractor brought a lawsuit in the District Court seeking essentially the same relief as was awarded to it by summary judgment in this cause. The contractor took a voluntary dismissal of that case in return for withdrawal of an unfair labor practice charge which the union had registered against it with the NLRB and composition of an issue about how many men the union was obliged to furnish the contractor for the work at Grand Coulee pending resolution of the questions raised by the McGettigan decision. The union maintains that, as a part of such settlement, the contractor agreed to permit the CIR to resolve the entire matter relative to a stipend for the men at Grand Coulee. The contractor denies such agreement but admits that it did withdraw the earlier lawsuit in keeping with some agreement with the union and that it did appear before the CIR. (RA 62, 63, 64, 73)

Obviously, on that record, there are questions of fact about the true content and intent of the agreement. This question is decisively material since, in

a labor relations situation, as in other cases, an agreement achieved in accordance with the normal rules of offer and acceptance is entirely binding and effective, whether reduced to writing or not. *Teamsters Local 524 v. Billington*, 402 F. 2d 510, 513, note 2 (CA 9, 1968). Under such circumstances, including admitted facts from which contrary inferences can be drawn, the summary judgment accorded the contractor, whereby the union lost its day in court, was inappropriate and should be reversed and the case should be remanded for trial. *United States v. Perry*, 431 F. 2d 1020, 1022 (CA 9, 1970)

Assuming, arguendo, that the foregoing was not made clear until Appellate proceedings were in progress, the presence of such questions of fact requires reversal of the summary judgment. Thus, in *Smith v. U. S.*, 367 F. 2d 366, 367 (CA 9, 1966) the Court held:

> Under Rule 56 (c), a motion for summary judgment may not be granted if there is a genuine issue as to a material fact. As this case was presented in the district court it was not apparent that any such issue of fact was involved. As the case unfolded in this court, however, genuine issues of material fact, as noted above, have been revealed. Under these circumstances we think the proper course is to send the case back for a full trial.

Other circuits than the ninth have viewed summary judgment with appropriate caution and their decisions conflict with the decision in the instant case. Summary judgment ". . . is not a catch-penny contrivance to take unwary litigants into its toils and deprive them of a trial." *Whitaker v. Coleman*, 115 F. 2d 305, 307 (CA 5, 1940).

> In considering motions for summary judgment, courts must bear in mind that summary judgment is a form of relief which should be applied with caution to the end that litigants be allowed a trial on bona fide factual issues. *International Ass'n. of M. & A. W., Dist. No. 8 v. J. L. Clark Co.*, 471 F. 2d 694, 697 (CA 7, 1972)

Therefore, in reviewing a summary judgment, an appellate court looks at the record in the light most favorable to the party opposing the motion. *U. S. v. Diebold*, 369 U. S. 654, 655 (1962); *Poller v. Columbia Broadcasting System*, 368 U. S. 464, 473 (1966). Manifestly, the Court of Appeals here did not govern itself with the caution required relative to a summary judgment area nor did it apply the foregoing and controlling principles.

2. The Decision of the Court of Appeals Departed from Fundamental Principles Established by the the Supreme Court that Govern Labor Arbitration and Conflicts with Decisions Rendered by Courts of Appeals of Other Circuits.

An arbitrator's award is not invalid when it draws its essence from the parties' contract. *San*

Francisco-Oakland Newspaper Guild v. Tribune Publishing Company, 407 F. 2d 1327, 1328 (CA 9, 1969); *Anaconda v. Great Falls Mill and Smeltermen's Union*, 402 F. 2d 749, 752 (CA 9, 1968). Moreover, in one of the leading *Steelworker* cases, the Supreme Court said,

> "when an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution to the problem. This is especially true when it comes to formulating remedies." *Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 597 (1960), Emphasis supplied.

It is likewise a precept of the federal law governing labor arbitration that, in disposing of a case, an arbitrator is empowered and obliged to accord effect to "all parts" of the collective bargaining agreement before him. *Ludwig Honda Mfg. Co. v. Fletcher and UAW*, 405 F. 2d 1123, 1130, note 31 (CA 3, 1969).

In this instance, Reverend McGettigan was authorized to look to the express "purpose" and "basic principles" underlying the parties' contract (quoted hereinabove) and to return a decision complementary thereto. In his judgment, such purpose and principles would best be served by remanding "the matter" to the parties with a directive that they negotiate further with specifically designated factors in mind. The problem between the parties arose, not from the McGettigan decision, but from the contractor's unwill-

ingness to abide by it, as contemplated by Article V of the contract. Therefore, the union referred the matter to the CIR where it can and should be resolved conclusively.

As noted hereinabove, the basic disputes procedure embodied in the parties' contract contemplates that it will be used to resolve

> Any grievance which may arise between the Union and the Contractor with respect to the interpretation or application of any terms of this Agreement. (1.4)

Here, the grievance of the union is that, by declining to accommodate and apply the proper interpretation of the McGettigan decision, the contractor is in violation of 5.1 of "this Agreement". When such grievance was referred to the local Labor-Management Committee and was not resolved, the Agreement required that it then be referred on to the CIR (1.7). This has been done by the union.**

** It should be noted that labor arbitration may contemplate more than a one-step process of adjudication. In fact, appellate review of arbitrator's awards through and by means of an arbitral process has been a significant component of U. S. industry. *Arbitration of Interest Disputes*, Proceedings of the Twenty-Sixth Annual Meeting, National Academy of Arbitrators, BNA, (1974) p. 53 ff.

Under the foregoing circumstances, the employer should not have brought the dispute before the district court. A basic component of contemporary national labor policy is that a judicial remedy is not available with respect to matters which the contracting parties have agreed to submit to a private tribunal unless and until such tribunal has been accorded an opportunity to consider and dispose finally of the matter. *Local* 89, *IBEW v. General Telephone Company of the Northwest*, 431 F. 2d 957 (CA 9, 1970) citing *Drake Bakeries v. Local* 50, 370 U.S. 254 (1962).

Although it is true that, in a typical labor agreement, arbitration is the final step of the grievance system, in the instant case, an arbitration decision generated under 5.1 of the parties' contract, becomes and has the same status or standing of a substantive provision of such contract about which the parties are in disagreement as to interpretation or application. In other words, a special arbitration decision rendered under 5.1 constitutes a basis for invocation of the overall disputes procedure established by 1.4 through 1.8 of the contract but it has no independent enforceability in the courts.

The CIR exists to determine cases such as the one the contractor brought before the District Court and the parties have agreed unreservedly that it will be used for such purpose. Under such circumstances, the

contractor's lawsuit was misconveived and should have been stayed by the court below.

In this connection, it should be emphasized that the CIR has "legislative" as well as judicial authority. Thus, "Standing Council Policies", known to and binding on the parties at all times material here, include the following:

> XIII — The Council reserves unto itself the right to change or substitute wording, if deemed advisable by the Council, when existing sections of agreements are submitted to the Council for interpretation as to their application or intent. (p. 16, Attachment to Second Affidavit of John F. Lane, RA 36)

The federal policy favoring arbitration as a means for determining disputes relative to labor contracts accords full decisional authority to an arbitral agency such as the CIR, *General Drivers Union v. Riss and Co.*, 372 U. S. 517 (1963), and applies when the arbitral authority is "legislative" as well as when it is "judicial". *Winston-Salem Printing Pressmen's Union v. Piedmont Publishing Co.*, 393 F. 2d 221 (CA 4, 1968). Manifestly, then, in the absence of agreement between the parties, the CIR is wholly authorized to prescribe what stipend, if any, the contractor should pay to its men at Grand Coulee under all of the circumstances, including the decision of Reverend McGettigan.

The CIR has long enjoyed an enviable reputation as an institution that effectively contributes to just, industrial peace within the electrical industry. The decision of the Court of Appeals fails to complement controlling national precedent and conflicts with decisions of other circuits that have focused directly on the CIR. As pointed out in *Parks v. International Brotherhood of Electrical Workers*, 314 F. 2d 886, 894 (CA 4, 1963, Cert. denied 372 U. S. 976):

> The Council, a bipartite body consisting of NECA and IBEW representatives was founded in 1920 by the IBEW and a predecessor employer's association. It consists of 12 persons, six representing each member organization, and additional alternates to assure the presence of at least four representatives of each organization at its quarterly meetings . . . while not strictly an arbitration body, primarily because the Council contains no neutral outsiders and exercises the power to alter the terms of agreements between IBEW locals and NECA chaptrs in its discretion, the Council functions to render final and binding decisions on collective bargaining issues submitted to it when local negotiations have reached an impasse. Its decision must be unanimous, each representative voting separately. Although most disputes are decided on submission of both parties, unilateral submissions are accepted when the collective bargaining agreement contains a Council clause and the submitting party has attempted in good faith but failed to effect a local settlement and has notified the other party of its intention to file and invited it to join the submission. Council decisions are reached in executive session after hearing

> argument and no final decision is reached until the Council adjourns, when the parties are simultaneously notified of the Council's action.
>
> The Council's principal purpose is "to remove the cause of friction and dispute in the electrical contracting industry" by providing a forum for conciliation and settlement of controversies between IBEW locals and NECA chapters. It has aided in creating a relatively "strikeless" climate within the electrical construction industry, and it is undisputed that by and large it has served the parties well over the years. (Emphasis added.)

As outlined hereinabove, the union takes the position that the McGettigan award decided only that the parties should negotiate relative to a daily "stipend" for the men at Grand Coulee; this decision was binding on the contractor under Article V of the underlying contract but the contractor refused to comply therewith which is to say that the contractor refused to comply with Article V. The contractor opposes the union's position so the parties are in dispute about the interpretation and application of such Article. As it has agreed to do in Article I, the union has referred such dispute, through the Labor-Management Committee, to the CIR, which is the supreme adjudicating tribunal under the overall disputes procedure established by the collective bargaining contract. Thus, far from avoiding or confounding federal policy relative to arbitration, the union has acted in accordance with the applicable statutory and judicial expressions

whereby, "final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement". 29 U.S.C. §173 (d), cited in *Steelworkers v. American Mfg. Co.*, 363 U. S. 564, 566 (1960).

The Court of Appeals in its decision has superseded and vitiated the CIR as the adjudicatory agency chosen by the parties. A decision consistent with that of the Court of Appeals for the Fifth Circuit was required here:

> The [CIR] was chosen to be the Judge. That Judge has spoken. There it ends. *Gulf States Telephone Co. v. Local* 1692, *IBEW*, 416 F. 2d 198, 202 (CA 5, 1969)

The same respect should be accorded the arbitral tribunal in the instant case.

Finally, assuming, *arguendo*, that the contractor's contentions are partially meritorious, the decision of the Court of Appeals should be reversed. The contractor asserts that the parties' collective bargaining agreement does not accord authority to the CIR whereby that agency could determine the effect of an arbitrator's award generated under Article V. Assuming an authorized judicial determination that the contractor is correct in so contending, the lack of authority could have been waived by the absence of

objection from the contractor when it had every reason to know that the union and the CIR "were proceeding on the theory that such authority existed." *United Steelworkers, Local 6 v. Northwest Steel Rolling Mills*, 324 F. 2d 479, 482 (CA 9, 1962). The "evidence" before the District Court contained no assertion or implication that the contractor effectively challenged authority of the CIR at any time before the initial decision therefrom. Thus, the contractor's attack on the CIR should not now be heard.

CONCLUSION

For the reasons set forth in the foregoing argument, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY ELECTRIC, INC., on its own behalf and for behalf [sic] of CITY - MANSON - OSBERG, a Joint Venture composed of City Electric, Inc., Manson Construction Company, *Plaintiffs-Appellees,* vs. LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Defendant-Appellant.*	No. 73-1270 OPINION

On Appeal from the United States District Court for the Western District of Washington

Before: LUMBARD,* MERRILL and WRIGHT
Circuit Judges

MERRILL, Circuit Judge:

This action was brought by appellees to secure a declaratory judgment respecting the effect of an arbitrator's decision.[1/] They contended that the decision was binding as to one determination but that as to a second determination it exceeded the arbitrator's authority. Appellant Union contended that the de-

* Honorable J. Edward Lumbard, Senior United States Circuit Judge of the Second Circuit, sitting by designation.

cision should be held binding in its entirety or not at all and that the dispute over the effect of the decision should have been resolved through contractual grievance procedures rather than by the district court. The district court agreed with plaintiffs and granted summary judgment.

Before dealing with the merits of the appeal from judgment a prelminary matter requires attention. After summary judgment was rendered the Union moved for reconsideration, contending for the first time that plaintiffs had waived any right to resort to court action on the dispute by having agreed to abide by the results of arbitration. The motion when made was without factual support. It was not until nearly a month after it had been filed that an affidavit was tendered in support. The district court denied reconsideration. On the basis of this tardily tendered factual dispute, appellants now contend that summary judgment was premature. We disagree. The motion for reconsideration was directed to the court's discretion. We do not regard rejection of the issue so tardily tendered as abuse. We turn to the merits of the dispute.

Appellee City-Manson-Osberg is a joint venture of which appellee City Electric, Inc. ("the Company"), is managing partner. The Company and appellant Union are parties to a collective bargaining contract

governing the wages, hours and working conditions of certain of the Company's etmployees. In the fall of 1971 the joint venture was awarded a contract to perform construction work in connection with Grand Coulee Dam. A portion of this work is within the jurisdiction of the Union and covered by the collective bargaining agreement.

Article V of the collective bargaining agreement governs the designation of "job headquarters" for a particular project. If the location of work being performed under the agreement can properly be designated a "job headquarters," the employer is not required to pay the Union workmen for their travel to and from the job site or their board and room costs. "Job headquarters" is defined as "any location within the area of this Agreement which may be designated by the Contractor as headquarters for any job. It shall be at a place where accommodations are sufficient within a 5 mile radius from such Job Headquarters to provide suitable board and lodging for all workmen reporting to such Job Headquarters."

Article V establishes the procedure for resolving a dispute as to whether a construction site can qualify as job headquarters. Prior to the start of any job the issue should, if possible, be resolved by conference between the parties. If they are unable to agree, the issue will be submitted to the Labor-Management

Committee; and, if the members of that committee cannot agree, the matter is to be referred to arbitration. In this case the joint venture calculated its bid for the work on the assumption that Grand Coulee would be a proper job headquarters and that therefore no travel allowance would have to be paid to Union workmen. The Union, at the pre-job conference, did not agree that Grand Coulee qualified as job headquarters. The Labor-Management Committee could not agree and the matter went to arbitration. The arbitrator ruled that the accommodations at Grand Coulee were sufficient to provide suitable board and lodging for a work force of 22 men. He ruled: "* * * that Grand Coulee can be accepted as Job Headquarters for this project to which a total off 22 men shall report." But "[i]f more than 22 men are employed on this project, then the decision rendered is no longer applicable."

It is this portion of the decision that plaintiffs-appellees sought to have declared binding. We agree with the district court that this ruling of the arbitrator was binding. See *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593 (1960).

The Union's dispute respecting job headquarters was based upon its experience with other electrical employers engaged in construction projects at Grand Coulee Dam. All (until this employer) had reached

pre-job agreements with the Union that employees would receive at least $10 per day travel allowance. This was a compromise figure between the $16 a day allowable by contract if Grand Coulee were determined not to be job headquarters and the zero amount allowable if it were determined to be job headquarters. Plaintiffs here refused to agree to this compromise and the arbitrator took note of the fact that as a result this employer was out of line with the others. The arbirtation decision provided:

> "It is also the opinion of the arbitrator that, in keeping with common practice and past experience (not 'past practices' or 'established practices') which should have been known by City Manson Osberg at the time of estimating and bidding on this project, the contractor and the union shall seek to negotiate the matter of an additional amount of daily stipend to the workmen employed on this particular project. As the United States Supreme Court pointed out in a 1960 decision, the arbitrator's decision is not limited only to the wording of the contract but must take into consideration 'such factors as the effect upon productivity of a particular result, its consequences to the morale of the shop, his judgment whether tensions will be heightened or diminished.'
>
> While the arbitrator cannot accept — as stated in a previous hearing on Grand Coulee— that $10.00 is an established amount to be paid men who are required to report to Grand Coulee as Job Headquarters, it is his opinion that the fact that men in the same industry, working on

> similar jobs and under the jurisdiction of the same union as those employed by City Manson Osberg for this project, are receiving an additional sum creates a situation that requires the attention of the parties involved and which demands consideration. This matter is referred to City Manson Osberg and Union 77, I.B.E.W. for negotiation."

It was this portion of the decision that plaintiffs wished the court to declare void and beyond the authority of the arbitrator. The district court so held. We agree. The arbitrator recognized that the $10 allowance was not pursuant to collective bargaining agreement (or an "established practice"), but was, with the other employers, the subject of an *ad hoc* modification. His ruling was that the parties should "seek to negotiate the matter."

It is not the function of an arbitrator, under this agreement or traditionally, to decide in what respects the contract in question should be modified in order to bring it into line with agreements of other employers. Contract modifications are not traditionally matters for arbitration. It is the function of the arbitrator to resolve disputes as to what the contract itself provides — as to what the rights of the parties are under the contract then in force, and it is in that connection that note is to be taken of the factors on which the arbitrator here relied in directing the parties to negotiate the amount of a stipend. See *United Steel-*

workers of America v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960). It is in that connection that we have given broad deference to arbitral decisions based on collective bargaining agreements.[2/]

We conclude that the decision of the arbitrator respecting the $10 daily allowance was unauthorized and enforceable.

The Union contends that, nevertheless, the Company's refusal to negotiate pursuant to the arbitrator's decision furnished the Union with a grievance which properly was processed under the collective bargaining agreement. Section 1.4 of the agreement provides:

> "Any grievance which may arise between the Union and the Contractor with respect to the interpretation or application of any terms of this Agreement or with respect to such matters as the alleged discriminatory or arbitrary treatment of an individual employee arising out of his employment * * * shall be determined by the following procedure."

When the Company refused to comply with the arbitrator's direction to negotiate the rate of travel allowance, Local 77 processed its grievance under this section. The Labor-Management Committee was unable to agree that a grievance under §1.4 was presented and the dispute was taken to the Council on Industrial Relations for the Electrical Contracting Industry

(CIR) which noted that the parties "have not negotiated to conclusion on the issue of a daily stipend," and "suggested" that they continue to negotiate.

The district court ruled that since this was not a dispute "with respect to the interpretation or application of any terms of this agreement" under §1.4 the grievance process of the agreement did not apply and the CIR was without jurisdiction to entertain the dispute. We agree. See *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 238, 241-43 (1962). Local 77 contends that the dispute involved the construction of Article V. We cannot agree. As we have noted, it did not involve the agreement as it exists but rather the reaching of an *ad hoc* modification to bring it into line with what had been agreed upon by other employers.

Local 77 contends that jurisdiction of the CIR is not limited to the precise language of the agreement. It points to a provision of the "Standing Council Policies" which Local 77 asserts is binding upon all parties:

> "XIII. INTERPRETATION OF EXISTING CLAUSES SUBMITTED FOR ADJUDICATION (Adopted February, 1959)
>
> The Council reserves unto itself the right to change or substitute wording, if deemed advisable by the Council, when existing sections of

> agreements are submitted to the Council for interpretation as to their appllication or intent."

In our judgment this must be construed to apply only to changes to make more clear the application or intent of an existing section in accordance with what is found to be the intent of the contracting parties. It cannot include changes that alter the obligations of the parties. By use of the term "wording" the Council has indicated that it is talking not about changes in the substance of the agreement but rather changes in the manner in which the substance of the agreement has been expressed. Here there is no dispute but that the Company had not agreed to a departure from the terms of Article V. It was the Company's refusal to depart from the terms of the contract that constituted Local 77's "grievance."

Judgment affirmed.

FOOTNOTES

1. (Page 1) Jurisdiction was based on §301 of the National Labor Relations Act as amended, 29 U.S.C. §185 (1970), and the Declaratory Judgment Act, 28 U.S.C. §2201 (1970).

2. (Page 6) See *United Steelworkers of America* v. *Amax Aluminum Mill Prods., Inc.*, 451 F. 2d 740, 741-42 (9th Cir. 1971); *Holly Sugar Corp.* v. *Distillery, R. W. & A. Workers Union*, 412 F. 2d 899, 901-02 (9th Cir. 1969); *San Francisco - Oakland*

Newspaper Guild v. Tribune Pub. Co., 407 F. 2d 1327 (9th Cir. 1969); *Anaconda Co.* v. *Great Falls Mill & Smeltermen's Union No.* 16, 402 F. 2d 749, 750-51 (9th Cir. 1968).

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY ELECTRIC, INC., on its own behalf and on behalf of CITY - MANSON - OSBERG, a Joint Venture composed of City Electric, Inc., Manson Construction & Engineering Co., and Osberg Construction Co., *Plaintiff,* vs. LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, *Defendant.*	No. 645-72C2 ORDER GRANTING PLAINTIFF'S SUMMARY JUDGMENT MOTION FOR DECLARATORY JUDGMENT.

The above-entitled proceeding came before the undersigned in open court the 24th day of November, 1972, on plaintiff's Summary Judgment Motion for Declaratory Judgment. The plaintiff appeared through its attorneys, PERKINS, COIE, STONE, OLSEN & WILLIAMS and J. David Andrews, and the defendant appeared through its attorneys, CRITCHLOW, WILLIAMS, RYALS & SCHUSTER and David E. Williams.

The Court considered the following items in support of and in opposition to the Motion:

1. Plaintiff's Motion for Summary Judgment.

2. Affidavit of Richard C. Sweezey in Support of Plaintiff's Motion for Summary Judgment.

3. Plaintiff's Brief in Support of Plaintiff's Motion for Summary Judgment.

4. Brief of Defendant Opposing Plaintiff's Motion for Summary Judgment and Supporting Motion to Stay.

5. Initial Affidavit of John F. Lane in support of Defendant's position.

6. Second Affidavit of John F. Lane in support of Defendant's position, and

7. The pleadings to the extent the same constitute admissions.

The Court having considered the evidence and argument of counsel finds that all parties having an interest in the question are now before the Court; that the Court has jurisdiction of the proceeding and the subject matter of the controversy; and that no genuine issue of material fact arises upon the pleadings necessary to a determination of the controversy before the Court and plaintiff is entitled to judgment as a matter of law as herein ordered.

It is, therefore, ORDERED, ADJUDGED AND DECREED by the Court that Plaintiff's Motion for Summary Judgment should be granted and the Court makes the following Order:

1. The Arbiter's decision (Exhibit C to the Complaint herein) that Grand Coulee is a proper "job

headquarters" under the parties' collective bargaining agreement for 22 Local 77 workmen is final and binding upon the defendant;

2. The Arbiter's decision (Exhibit C to the Complaint herein) directing the parties to negotiate a per diem payment to employees reporting to a proper "job headquarters" under the collective bargaining agreement is void and in excess of the Arbiter's authority; and

3. Local 77 has no right to process through the normal grievance procedure, Article I of the collective bargaining agreement, to the Council on Industrial Relations any allegation that plaintiff is refusing or failing to carry into effect the arbitration decision under Article V of the collective bargaining agreement (Exhibit C to the Complaint herein), and the Council on Industrial Relations has no jurisdiction to rule upon any such grievance; and

4. The Council on Industrial Relations' action upholding Local 77's grievance (Exhibit E to the complaint herein) is void and without effect because it is in excess of the Council on Industrial Relations' authority.

DONE IN OPEN COURT this 24th day of November, 1972.

JUDGE WALTER T. McGOVERN

APPENDIX C

ARTICLE I OF THE PARTIES' CONTRACT

1.4 There shall be no stoppage of work either by strike or lockout or any subterfuge thereof because of any disputes relating to this Agreement. Any grievance which may arise between the Union and the Contractor with respect to the interpretation or application of any terms of this Agreement or with respect to such matters as the alleged discriminatory or arbitrary treatment of an individual employee arising out of his employment or to any claim by an employer that workmen have failed to install material in a workmanlike manner or to use reasonable care in the use of the employers' tools and equipment, shall be determined by the following procedure.

1.4.1 Any employee having a grievance may present it in person when the Steward has been given an opportunity to be present, or the Steward may present such grievance; in either case it shall be presented to the foreman or supervisor in charge in an endeavor to settle the grievance on the job.

1.4.2 Any employer or employee having a grievance as hereinbefore stated shall present such grievance in writing to the Shop Steward on the job or to a Business Representative of the Local Union stating so far as possible the nature of his claim and the remedy he requests.

1.4.3 If the grievance has not thus been settled as provided for in Sections 1.4.1 and 1.4.2, then it shall be referred, in writing, on an appropriate form provided by the Union to the Business Manager or his representative, who may immediately present such grievance in writing to the contractor or his representative. A written reply to such grievance shall be made within ten (10) work days from receipt thereof.

1.4.4 In the event the grievance is not settled by the above procedure, the problem shall be presented to the Labor-Management Committee as set forth in Section 1.5 of this Article, provided it has been processed as required in Sections 1.4.1, 1.4.2 and 1.4.3.

1.4.5 All claims or grievances not presented within thirty (30) calendar days after the time they are alleged to have arisen, shall be forever waived. For purposes of this section, a grievance is not considered to exist until the grieving party knows or could reasonably be expected to know of the alleged violation.

1.5 The Labor-Management Committee shall consist of three (3) representing the Union and three (3) representing the Contractor. It shall meet regularly at such stated times as it may decide. However, it shall also meet within forty-eight (48) hours when notice is given by either party. It shall select its own Chairman and Secretary. Meetings shall be conducted in accordance with 'Structure and Procedural Rules'

as adopted June 15, 1966. Any decision made by this Committee shall be final and binding.

1.6 All matters coming before this Committee shall be decided by a majority vote. Four (4) members of the Committee, two (2) from each of the parties hereto, shall be a quorum for the transaction of business.

1.7 Should this Committee fail to agree to adjust any matter, such shall then be referred to the 'Council on Industrial Relations for the Electrical Construction Industry of the United States and Canada.' Its decisions shall be final and binding.

1.8 When any matter in dispute has been referred to the Labor-Management Committee or the 'Council on Industrial Relations for the Electrical Construction Industry of the United States and Canada' for adjustment, the provisions and conditions prevailing prior to the time such matters arose shall not be changed or abrogated until the decision is rendered.